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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1928

No. 450

MORRIS AND COMPANY, et al,

Petitioners

vs.

SKANDINAVIA INSURANCE COMPANY

Respondent

BRIEF FOR RESPONDENT

PALMER PILLANS,
JAS. A. LEATHERS,
for Respondent.

Bigham, Englar and Jones
Pillans, Cowley and Gresham,
Leathers and Sykes,
of Counsel.

There was no opinion delivered by Judge Holmes at the trial of the instant case in the District Court.

The opinion of the Circuit Court of Appeals is reported in 27 Fed. (2nd), 329-30.

SUPPLEMENTAL STATEMENT OF THE CASE.

For convenience of reference, the petitioner, who was plaintiff below, will in this brief be referred to ordinarly as "plaintiff"; and the respondent, who was defendant below, as "defendant".

In order that the Court may have a complete picture, it seems advisable to supplement somewhat plaintiff's statement of the case.

The insurance policy sued on is set out at pages 5-9 of the record. It appears therefrom, as well as from the declaration itself (Rec. pp. 3-4) that the insurance was contracted for at Buenos Aires to cover the carriage of certain dried beef from Montevideo, on the River Plate, to Havana. The contract was executed on July 11th, 1918. The declaration shows that the bill of lading, covering the insured beef, was issued on May 20, 1918; the policy issued on July 11, 1918; and that the loss is claimed to have hapened on May 23rd, 1919.

By the terms of the policy (Rec. 7) any claim growing out of the policy was payable in Buenos Aires.

Thereafter, on November 15, 1921, Messrs. Morris & Co. brought an action *in personam* in admiralty against the Skandinavia Insurance Company, in the District Court of the United States for the Southern District of New York.

The Skandinavia Insurance Company had an office in New York City (record 117) which this Court judicialy knows is within the Southern District of New York. At that office apparently were sundry persons representing the Skandinavia Insurance Company and readily amenable to process. It would seem that no difficulty should have been experienced in procuring personal service on the Skandinavia Insurance Company in the Southern District of New York. Apparently none was experienced, as the said admiralty action not only was

brought there but it was prosecuted (or languished—the record doesn't show which) from time of its bringing, noted above, to April 16th, 1925, when the present action was commenced at Law in the Circuit Court of Harrison County, Mississippi.

After the Mississippi Suit had been brought, had been removed to the Federal Court and had been pending well on toward two years, the plaintiff finally dismissed his New York action.

It might be fairly thought, it would seem, that the District Court of the United States for the Southern District of New York is reasonably competent to hear and determine a controversy over a policy of marine insurance. There was no difficulty in securing proper and valid service of process there, and the cause was actually pending in the Court for a number of years. Why plaintiff developed a desire to abandom an action in which he certainly had service and before a Court experienced in that character of controversy, for an effort that has now lasted some three years without yet getting across the threshold of another court; the record does not explain.

These efforts by a citizen of one soveriegn to sue a citizen of another sovereign in the forum of still a third soveriegn, are by no means uncommon. The decisions of our courts are studded with instances. Where defendant has thought that there was no jurisdiction of his person, as did defendant in the case at bar, the ordinary practice in the Federal Courts has been to move to set aside and quash the summons and service and to dismiss the suit. Illustrations are *Conley vs. Alkali Works*, 190 U. S. at 407, 409; *St. Louis Railway vs. Alexander*, 227 U. S. at 223; *Chipman, Limited, vs. Jeffery*, 251 U. S. 373, at 376.

Mississippi has provided a statutory method for the raising of jurisdictional questions. It is contained in

Section 537 of Hemingway's Mississippi Code of 1927. It reads thus:

> "537 (523) *Pleadings — Several Pleas in abatement—Judgment to be 'respondent ouster' and not 'quod recuperet.*,—1. The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration; and he shall set forth the matters in separate pleas, and in plain, intelligible, concise language, without regard to technical form; and where the matter pleaded does not appear on record, he shall verify such plea by the oath or affirmation of himself or some other credible person; and in the event the plaintiff takes issue on the plea in abatement and it is found in his favor, he shall have judgement respondeat ouster and not quod recuperet, and the defendant shall thereupon be entitled to plead to the merits as if no plea in abatement had been interposed, and the trial shall proceed as in other cases."

This statute seems to indicate that under the Mississippi practice, one must *plead* to the lack of jurisdiction rather than raise the question by motion to quash; and, further, that it is the legislative thought that cases should not be strung out by the successive interposition of pleas to the jurisdiction and of dilatory pleas, but that all should be pleaded and disposed of together and at the same time.

In the *instant* case defendant pursued both courses; it moved to quash the atempted service and to dismiss the cause for want of jurisdiction over the person of the defendant (Rec., 35-36); and it filed two *distinct* pleas. (Rec., 37-39).

These pleas are not only wholly distinct in thought,

but they are separated into paragraphs and are numbered respectively "I" and "II" in Roman numerals.

The motion and the two pleas, were filed on November 27th, 1925, within the pleading time after the removal of the cause to the Federal Court.

When the matter came on to be heard, it was the opinion of the learned trial judge that the proper method to raise the question of jurisdiction, was by pleading pursuant to the Mississippi statute, and that the motion and the plea should be merged and treated as a plea, in response to which evidence would be heard and the matter examined as with any other plea. (See second paragraph in Judge Holmes' order of March 4th, 1927, Rec. p. 68.)

At the time of the writing of the policy sued on in the declaration, the Skandinavia Insurance Company wrote direct insurance, but it subsequently abandoned this branch of underwriting and became a re-insurance company solely. Such was its business, and its only business, throughout the period of time covered by the controversy over the question of jurisdiction, that we are now concerned with.

With reference to plaintiff's insistence that defendant was doing business in Mississippi, perhaps it may not be amiss to reduce to narrative form that portion of the testimony of Mr. Geberth, which deals with reinsurance and its relation to doing business in Mississippi by the Skandinavia Company; and that part of Mr. Hardy's testimony which had to do with doing business in Mississippi by the Skandinavia Company.

> *Mr. Geberth*: I am Assistant Manager of the Skandinavia Insurance Company, Ltd., of Copenhagen, Denmark; for the United States, having been appointed to that office on August 5th, 1924, and been in that position ever since. My chief duty is supervising the writing of insurance in the United States for my Company.

During the time that I have been Assistant United States Manager for this company, the Skandinavia Insurance Company, Ltd., has had no transactions through Messrs. R. C. Wilkerson, Inc., or anyone else, within the State of Mississippi and has not transacted any business in the State of Mississippi through either R. C. Wilkerson, Inc., or anyone else.

The Skandinavia Insurance Company was not doing business in Mississippi on April 17th, 1925, and has not done any business within the State of Mississippi since that date.

Throughout the time that I have been Assistant United States Manager, and up to and including the present time, the nature of the business of the Skandinavia Company has been the business of re-insurance. The Company has not been writing any direct insurance during that period.

The business of re-insurance is transacted thus: The re-insuring company takes over surplus lines or participation lines from the direct writing company. The direct-writing company writes policies on property physically located within the United States—fire insurance on houses and property. The Skandinavia Insurance Company re-insures the direct-writing company. *The contracts of re-insurance were executed in the New York Offices of the Skandinavia Insurance Company, Ltd., or in the office of the ceding company.* By ~~real-writing fire insurance companies which have~~ "ceding company," I mean the direct-writing company. In such re-insurance contracts or treaties, the Skandinavia Company agrees to reimburse the direct-writing company for losses incurred by it on risks reinsured with the Skandinavia Company. Properties insured by the direct-writing company are located anywhere in the United States and di-

rect-writing fire insurance Companies which have

treaties with the Skandinavia Company may have issued policies on property physically located in the State of Mississippi. Under the terms of the re-insurance treaties entered into by the Skandinavia Company with direct-writing companies, the Skandinavia Company does not select the risk, with respect to the physical location of the property—all re-insurance is done under contract and the re-insurance company has no choice in the matter.

The Skandinavia Company has never had any transactions of re-insurance with any insurance company which has or had its home office within the State of Mississippi, and has never had any transaction of re-insurance under or pursuant to the laws of the State of Mississippi.

With reference to my statement that some of the direct-writing companies, which had re-insurance treaties with the Skandinavia Company, may have issued policies on properties physically located within the State of Mississippi, I would say that no re-insurance transactions, with respect to such risks, were had within the State of Mississippi, but were had outside the State of Mississippi.

All the Skandinavia Insurance Company, Ltd., did in the State of Mississippi, was the filing of the annual statement with the Insurance Department of the State of Mississippi; reporting such business as was transacted in general by the Skandinavia Insurance Company, which means the General Annual Statement reporting the risks which it had re-insured and which risks were written by the direct-writing company located in the State of Mississippi.

Robert C. Wilkerson, Inc., of Vicksburg, Mississippi, was what is known as a nominal agent,

and had no authority to write any business whatever. During the time I have been connected with the Skandinavia Company, it has had no agent in Mississippi other than Robert C. Wilkerson, Inc. (Rec. 116-121.)

(It will be understood that this does not purport to be a quotation, but is simply putting in narrative form, in the first person the witness' testimony.)

Mr. Hardy: I am a member of R. C. Wilkerson, Inc., and have been for sixteen and a half years. I know the Skandinavia Company, and have used their name as agents. Our first connection with them was the receipt of a letter from Messrs. Metzenbecher & Ballard (at that time general agents in New York for the Skandinavia Company) requesting that they be allowed to designate the R. C. Wilkerson Company as agents for a number of companies in Mississippi. My firm acquiesced, and outside of that, all I know is that they sent us a check for $5.00 (this is erroneously printed "$5,000.00" in the record) for each of the companies; and that was all the correspondence and all the dealings this house had with the Skandinavia Company.

Subsequent to that time the Skandinavia Company left Mississippi with a lot of the other big companies, and we heard nothing more until the companies came back in 1923, when Messrs. R. C. Wilkerson Company resumed the same relationship as before with the Skandinavia Company.

The sole communication that we had with them had to do with re-insurance; there was no direct insurance writing or writing of direct risks, that I know of. During the entire period of time that the said relationship existed between R. C. Wilkerson, Inc., and the Skandinavia Company,

Wilkerson, Inc., has never at any time written any business in Mississippi for The Skandinavia Company, nor has any agent or representative of Wilkerson, Inc., ever written any contract of insurance of any character, either directly or indirectly, either direct insurance or indirect insurance, in Mississippi for the Skandinavia Company.

Reinsurance is insurance which the insurer itself takes out on its liability on certain risks—it insures its excess lines. For instance, when a company writes a policy for ten thousand dollars on a building and wishes to cary only twenty-five hundred dollars of its risk, that company insures afresh the balance of the risk as re-insurance. The re-insuring company doesn't insure the original assured but insures the original insurer. At no time throughout the period of R. C. Wilkerson & Company, Inc., representation of the Skandinavia Company, has the Skandinavia Company written even that character of insurance through our office in Mississippi. As far as my personal knowledge goes, the Skandinavia Insurance Company has not made any contracts, either direct or re-insurance, through any office other than our office in Mississippi. Throughout the time that I have been testifying about, our Company has not been authorized by the Skandinavia to write any insurance, either direct or re-insurance, in Mississippi. (Rec. 124-126)

The reason that the Skandinavia Insurance Company qualified to do business in Mississippi in accordance with the laws of the State of Mississippi, notwithstanding that it wrote no insurance and did no business in Mississippi, clearly appears from the letter written to Mr. Henry (the Mississippi Insurance Commissioner, uniformly referred to by the Chicago compositor, who set up the record, as "Henery") under date March 16,

1923 by Mr. Ehmann, at that time Assistant United States Manager (the predecessor to the witness Geberth); and from Sec. 5865 of Hemingway's Mississippi Code of 1927 (Sec. 5070 of Hemingway's Mississippi Code of 1917.) The said Section reads thus:

> "5865. (5070) License or renewal. Whenever an application for license, for renewal of license, or for admission to this state, is made by a company, whether of this state or another state of the United States, or of a foreign country, for the transaction of business of fire insurance herein, such company shall, as one of the prerequisites of admission, file a sworn declaration signed by its president and secretary, or officers corresponding thereto, *that it will not reinsure any risk or part thereof taken by it on any property located in Mississippi with any company not authorized to transact the business of fire insurance in this state;* provided that when all efforts have been exhausted and fail to place the entire line of needed reinsurance on any one risk in companies authorized to do business in this state which have representatives in the community authorized to bind such companies, at the same rate as offered by other sovlent companies, the excess may be written in companies not thus authorized. In all such cases an affidavit shall be filed by the company, or its agent, within one month from the date of placing such reinsurance with the insurance commissioner of this State, giving complete list of the companies applied to for reinsurance, with the amounts accepted by each of those authorized to do business in the state, and a list also of the companies writing the excess herein provided for, with the amounts written by them respectively, and this affidavit shall be open for public inspection; provid-

> ed, further, that companies shall not be required to offer any portion of the needed reinsurance to any company which is, or has within the preceding twelve months been in an impaired condition. Reinsurance premiums paid to companies authorized to do business in Mississippi may be deducted from gross premiums in the semi-annual tax returns, when affidavits are furnished from such authorized reinsuring companies that the amounts so deducted are included in their own semi-annual tax returns, and are paid on by the authorized reinsuring company." (Our emphasis.)

It will be noted that by the terms of the said statute, no direct-writing company can procure, or renew, a license to do business in Mississippi or write any risks therein without making oath that it will not reinsure in any company not authorized to do business in Mississippi. Consequently any reinsurance company desiring to reinsure direct-writing companies which have written risks located in Mississippi, must itself (the reinsuring company) *qualify* to do business in Mississippi though it may intend to do none and in fact do none.

The said letter from Mr. Ehmann to Mr. Henry, is set out on page 139 of the Record. Note the opening paragraph thereof:

> "This Company being desirous of re-entering the State of Mississippi *for the purpose of transacting a fire reinsurance business under treaties with direct writing companies authorized to transact business in your state*, we shall consider it a favor if you will be kind enough to advise us whether it will be sufficient for this purpose for us to file with you an annual statement for the year ending December 31, 1922, together with the necessary fees in connection therewith."

The publications in the *Clarion Ledger* of the condensed statements of the Skandinavia Insurance Co. (one of which, together with the testimony of the witness Manar, is set out at pages 135-6 of the Record) were caused to be published, not by the defendant but by the Insurance Department of the State of Mississippi. The payments made therefor were made by the Insurance Department though with money sent to the Insurance Department by the Skandinavia Insurance Company. See Record 137, where it also appears that the statements were not sent by the Skandinavia Insurance Company to the newspaper, but were sent by the Skandinavia Company to the Insurance Department.

In plaintiff's brief in this Court there persists the same insistence made on the trial of the cause in the District Court, and in argument and brief in the Circuit Court of Appeals, touching re-insurance. It seems to be either a curious confusion of thought, or a complete misconception of the position of the defendant. On page 3 of petitioner's brief in this Court, it is asserted that, after issue joined and a jury empaneled,

> "it appeared that the defendant did only a *re-insurance business* (the emphasis is copied just as it is in the brief) in Mississippi, which aggregated, however, more than $4,000,000 * * * * * in one year; premiums aggregating more than $60,000."
>
> To the quoted statement petitioner cites "(R. p. 224)"

There is no such page in the Record. Apparently the reference is intended to be to page 180 of the Record. In plaintiff's attempt to show the doing of business by the Skandinavia Insurance Company in Mississippi, plaintiff put in evidence the annual statements filed with the Insurance Commissioner by the Skandinavia Insur-

ance Company pursuant to law as a part of the qualifying in the State. The offer is shown at page 169 of the Record. A condensed summary of the statements, with an exact copy of those parts which the plaintiff deemed material to have in the Record *verbatim*, runs from p. 169 to p. 182, inclusive.

These annual returns, were, as noted, made as a part of the requirements of the Mississippi statutes touching admission, and had to be complied with, as hereinbefore pointed out, in order to enable the Skandinavia Company to re-insure direct-writing companies which had underwritten risks physically located in Mississippi. The apposite statutes are *Sections* 5866, 5876 *and* 5877 of *Hemingway's Mississippi Code of* 1927. (Being, respectively, Sections 5071, 5081 and 5082 of Hemingway's Mississippi Code of 1917). As no question arises touching the construction of these statutes, nor any debate as to them, we daresay that it is not necessary to set them out *in haec verba* but that it will suffice to state succinctly their tenor.

Section 5866 requires annual returns as to reinsurance; Section 5877 requires returns by fire insurance companies as to their business generally; and Section 5876 requires the Insurance Commissioner, in December of each year, to furnish to each insurance company authorized to do business in the state, two or more blanks adapted for their annual statement. Each of the statutes requiring returns, requires that the returns shall be made to the Insurance Commissioner in such form and detail as may be prescribed by him.

The Insurance Commissioner does require returns to be made in great detail upon elaborate printed forms. These returns made by the Skandinavia on these forms, were put in evidence for the years 1923, 1924 and 1925. It is these returns which are summarized in the Record. The original returns were before the Circuit Court of Appeals on certificate up from the trial Judge. Every-

thing in them is printed except the filling in of the figures.

The whole testimony touching the business done by the Skandinavia Company, is that already hereinbefore summarized from the depositions of Messrs. Geberth and Hardy. There can't be any dispute over what was done. What is intended to be asserted by the petitioner, is that what was done "situsedˮ (petitioner's word) the re-insurance business in Mississippi although done wholly without the State. It seems advisable to draw attention to this as otherwise one might be misled, by the statement quoted from petitioner's brief, to think that the Skandinavia Company was actually doing a re-insurance business within the State of Mississippi.

This same re-insurance thought appears twice again in plaintiff's brief as "Point IIIˮwhich is set out in identical phraseology on page 16 and again on page 29. This is the language:

> "When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion, would not confer immunity from suit."

At no time has defendant contended, in any court, that doing the business of re-insurance was not a "doing business". What was urged by defendant, and found both by the trial judge and by the Circuit Court of Appeals for the Fifth Circuit, was that there was no writing of *any* insurance, re-insurance, or otherwise, within the State of Mississippi—no business of any sort done within the State. Apparently the thought attempted to be asserted by the plaintiff, is that we claimed that because we were reinsurers, as distinguished from direct insurers, therefore we were not subject to suit. No such contention has been made.

On page 4 of plaintiff's brief, there appears this:

> "Defendant further showed compliance with Section 5073 Mississippi Code, providing: All foreign companies must make 'a deposit * * * * * *in exclusive trust for the benefit and security of all the Company's policy holders and creditors in the United States * * * * * *'." (The emphasis is copied from plaintiff's brief.)

Again, at pages 9-10 of plaintiff's brief, it avers that the defendant

> "had specifically made a deposit under Section 5073 of Hemingway's Code of 1917 * * * of a sum not less than the capital required of like companies under this chapter * * * * * in exclusive trust for the benefit and security of *all the Company's policy-holders and creditors in the United States.*" (Plaintiff's emphasis).

It is thought that one would get the impression, from these statements, that the Skandinavia Insurance Company had made in Mississippi a deposit for the benefit of policy-holders and creditors. Such is not the case. In the deleted matter indicated by the stars in the quoted matter from plaintiff's brief, is contained an important portion of the statute, bearing on this particular thought. The Section is short and we set it out in full:

> "5868 (5073) DEPOSIT REQUIRED OF COMPANIES OUTSIDE UNITED STATES. Such foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admited until, besides complying with the conditions of section 5864, it has made a

> deposit with the treasurer of the state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. Such deposit must be in exclusive trust for the benefit of all the company's policy-holders and creditors in the United States, and may be made in the securities but subjected to the limitations specified in section 5841, and such deposit shall be deemed for all purposes of the insurance law the capital of the company making it."

It will be noted that the deposit to be made by a foreign company, may be made with the treasurer of the State of Mississippi *or with the financial officer of some other state of the United States.* In the instant case the deposit was actually made in the state of New York. This appears in the Record at page 135 in the statement furnished by the Skandinavia Insurance Company to the Insurance Department of Mississippi and published by that Department in the Jackson *Clarion Ledger*, a daily newspaper. From that it appears that the Skandinavia Company had deposited *with the New York Insurance Department* $400,000, which became, for the purposes of the Mississippi insurance statutes, the capital of the company making the deposit.

SUMMARY OF THE ARGUMENT

I.

In numerous decisions, extending over a period of years, this Court has worked out a formula of principles governing the grant or refusal of petitions for writ of certiorari. It may be stated thus:

(a) The question involved must be one of peculiar gravity and general importance.

Lau Ow Bew, Petitioner, 141 U. S., 583 at 587-88.
In re Woods 143 U. S., 202 at 205-6.
Forsyth vs. Hammond, 166 U. S. 506.
Fields vs. United States, 205 U. S. 292.
Hamilton Shoe Co. vs. Wolf Bros., 240 U. S., at 258.
Houston Oil Co., vs. Goodrich, 245 U. S., 440 at 441.
Layne Corporation vs. Well Works, 261 U. S. 387 at 388, 393.

or

(b) There must be a real and embarrassing conflict of opinion and authority between two or more of the Circuit Courts of Appeal or between Circuit Courts of Appeal and the Courts of a State.

Forsyth vs. Hammond, 166 U. S. 506.
Fields vs. United States, 205 U. S. 292.
Hanover Milling Co. vs. Metcalf, 240 U. S. 403.
Layne Corporation vs. Well Works, 261 U. S. 387 at 388, 393.

What is a question of peculiar gravity and general importance, is illustrated by the *Lau Ow Bew case*, where there was involved the construction of the Chinese Exclusion Act and its consideration *in pari materia* with our treaty with China—public questions involving important international relations. Or by *Sandberg vs. McDonald* (248 U. S. 185), and its companion cases, which involved the construction of an important Act of Congress, sought to be applied to things done abroad.

On the other hand, what are not questions of such gravity and general importance, is illustrated, among the cases hereinbefore cited, by *in re Woods*.

As this Court said in a recent pronouncement on this subject:

"It is very important that we be consistent in not

granting the writ of certiorari except in cases involving principles the settlement of which is of *importance to the public as distinguished from that of the parties* * * *."*

Layne Corporation vs. Well Works, 261 U. S. at 393.

II.

In its recent revision of its Rules, this Court has summarized the result of these holdings, in paragraph 5 of Rule 38. This paragraph 5 divides into three groups the general character of questions which will be considered in the granting of writs. These groups are lettered respectively, (a), (b) and (c). Groups (a) and (c) have no application here. If petitioners have a case which should be brought up, it must lie under some one of the heads contained in group (b); which group, we take it, would be considered in connection with the decisions of the Court cited to Point I, hereinbefore.

III.

On page 5 of plaintiff's brief are set out the grounds on which the issue of the writ is sought. They are three in number as stated by plaintiff, but involve, it would seem, four thoughts; which may be thus restated:

(1) That what plaintiff styles defendant's "contract of qualification" conferred jurisdiction of all causes of action, whether arising within or without the State of Mississippi and whether the defendant was or was not doing business within the State of Mississippi.

(2) That if the first position be unsound; and if it be requisite, to jurisdiction, that the defendant must have been doing business within the State of Mississippi at the time suit brought; then that the business of re-insurance done by the defendant as disclosed by the Record, was a doing of business within Mississippi.

(3) That the defendant, by removing the cause from the State to the Federal Court, effected a general appearance in the Federal Court, which waived want of jurisdiction and brought the person of the defendant into the Federal Court for all purposes.

(4) And that the Circuit Court of Appeals for the Fifth Circuit, in giving effect to the Mississippi pleading statute (Sec. 537 of Hemingway's Mississippi Code of 1927—Sec. 523 of the 1917 Code), decided in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit.

We shall discuss these contentions in the order in which we have grouped them, which follows the order in which they are put by plaintiff.

IV.

The law touching the effect of service of process on an agent-for-process under State agent-for-service statutes, is clear and unambiguous, and is settled by repeated decisions of this Court. It may be thus stated:

While a state may require of a foreign corporation that, as a condition to qualify, it must enter into an agreement, to accept, as valid, service of process on some person especially designated for this purpose, this agreement has no application to the service of process in a cause arising out of a transaction had without the State —a cause of action arising without the State— unless the statute itself so specifically declares, or unless the court of last resort in such State has so construed its agent-for-service statute.

St. Clair vs. Cox, 106 U. S. at 356.
Old Wayne Life Assn. vs. McDonough, 204 U. S. 8, at 14, 18-19, 21, 22, 23.
Hunter vs. Insurance Co., 218 U. S. 573, at 579-80, 586, 587, 588.

Simon vs. Southern Ry. Co., 236 U. S. 115, h. n. 11 and opinion at 130, 132.
Robert Mitchell Furniture Co., vs. Construction Co., 257 U. S. 213, at 215, 216.

V.

There is no Mississippi statute specifically declaring that the agent-for-service statute of that State is intended to apply to causes of action arising without the State; nor is there any decision of the Court of last resort construing the statute to cover such. The statutes and Mississippi decisions relied on by the plaintiff, were collated and set out in its brief in the Circuit Court of Appeals. It is thought that no good purpose would be served, in a brief of the summary type required by this Court on petition for the grant of a writ, to set out in detail the statutes and decisions. They were discussed at large by both parties before the Court of Appeals. Suffice it to say, with the Court of Appeals:

> "It may be conceded that if the statutes of Mississippi requiring appellee to appoint agents in Mississippi made service on those agents good as to a transitory cause of action arising elsewhere, appellee would be barred thereby, but we find nothing in the laws or jurisprudence of Mississippi going to that extent."
> (Record 206.)

VI

We take it that plaintiff concedes that if it be wrong in its insistence as to the ground covered by its first proposition relied on for the issue of the writ, then there was no jurisdiction in the first instance unless the Skandinavia Insurance Company was doing business in Missis-

sippi. Plaintiff's insistence is that the defendant was so doing on the facts shown in the Record.

It is thought that a reading of the testimony should negative this insistence, without reference to adjudged authority. If desired, however, reference may be had to

Conley vs. Alkali Works, 190 U. S. 406.
Peterson vs. Ry. Co., 205 U. S. 364.
Green vs. Ry. Co., 205 U. S. 530.
Hunter vs. Ins. Co. 218 U. S. 573.
Philadelphia & Reading Ry. Co., vs. McKibbin, 243 U. S. 264.
Chipman vs. Thos. Jeffery Co., 251 U. S. 373.
Robert Mitchell Furniture Co. vs. Construction Co. 257 U. S. 213.

VII

Plainitff's contention that, by filing a petition for removal from the State to the Federal Court, the defendant effected a general apearance and could not thereafter in the Federal Court, object to the jurisdiction of the person; is precisely ruled against it in

General Investment Co. vs. Lake Shore Ry. Co., 260 U. S. 261, head n. 3, Opin, at 268-9;
Wabash vs. Brow, 164 U. S. 271, see brief of defendant in error, at 273-4, and Opin. at 276,279.

Plaintiff's contention is grounded on a line of cases headed by the overruled case of *ex parte Wisner*, 203 U. S. 449 That case, and the other cases of similar tenor cited in plaintiff's brief, all follow the now discredited notion that a removal could not be had of a cause which would not have lain in the removal court in the first instance. The waiver idea is based on this chain of reasoning: That, if the Federal Court

cannot entertain jurisdiction of the removed cause because it could not have entertained jurisdiction if the cause had been brought there in the first instance, and the cause be removed to the Federal Court by a petition filed by the defendant; then the defendant, being in the Federal Court, cannot have the cause dismissed because the suit could not have originally been brought in the Federal Court. This position is manifestly sound, if the premise to taken as sound. If that were law, it would render impracticable the maintenance of the action because it could be removed ,under the removal statute, out of the State Court and then dismissed out of the Federal Court. No further argument is needed to indicate how wholly inappropriate such line of reasoning is to the situation existing here. The thought insisted on by the defendant in the instant case, and justified by the authorities, is that the defendant has not been brought properly into *any* Court by proper service of process. This is applicable equally to the State Court or the Federal Court. There is no waiver of this by removal from the State to the Federal Court. Not only must this be true on reason and principle, and wholly without the line of thought in the removal cases; but, as hereinbefore pointed out, it has been expressly and repeatedly ruled in the Supreme Court in cases removed from the State to the Federal Court and the jurisdiction of the person attacked in the Federal Court because of defective service.

While this Court, of course, is familiar with the history of *ex parte Wisner*, yet for convience of reference we would say that the decision which finally and definitely and completely destroyed it, was *Lee vs. Railway Co.*, 260 *U. S.* 653.

VIII

Plaintiff's last ground is that the action of the Cir-

cuit Court of Appeals for the Fifth Circuit on plaintiff's waiver-by-pleading insistence, was

(1) Contrary to the decisions of this court; and

(2) In conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Mankin vs. Bartley*, 266 Fed., 466 (which decision, by the way, is erroneously cited in plaintiff's brief as being in 255 Fed.)

It is thought that an examination of the apposite decisions of this court; and an examination of *Mankin vs. Bartley*; will show that plaintiff is wrong in both particulars.

We take them up in the order stated.

(1) Section 523 of Hemingway's Mississippi Code of 1917 (Sec. 537 of Hemingway's Mississippi Code of 1927) is already hereinbefore in this brief set out in our supplemental statement of the case. It will be noted by reference thereto, that the defendant is expressly authorized to plead at the same time to the jurisdiction of the Court and in abatement. The purpose of this statute is clear. If pleading in abatement at the same time with plea to the jurisdiction, pursuant to the leave given by the statute, should work the effect claimed by plaintiff, the statute would be entirely idle. Indeed, it seems to be conceded by plaintiff that if the cause were in the State Court the statute would prevent any waiver of the jurisdictional insistence, by the filing at the same time of the plea in abatement. The insistence is that the statute has no application to cases pending in the Federal Court. But this Court has ruled expressly otherwise.

> Sou. Pac. Ry. Co. vs. Denton, 146 U. S. at 208-209.
> Mex. Central Ry. Co. vs. Pinkney, 149 U. S. at 206.
> Roberts vs. Lewis, 144 U. S. 653, at 656-657.

Roberts vs. Lewis is an excellent illustration of the

principle involved; and in *Southern Pacific vs. Denton* appears a categorical denial of plaintiff's insistence, and an affirmation of the principles which governed the action of both the trial court and the Circuit Court of Appeals for the Fifth Circuit in the instant case. The statement referred to is in this language:

> "Under this Act (the Conformity Act) the Circuit Courts of the United States follow the practice of the Courts of the States in regard to the form and order of pleading, *including the manner in which objection may be taken to the jurisdiction and the question, whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together.*" (Our emphasis.)
> Sou. Pacific Ry. Co. vs. Denton, 146 U. S. at 209.

Nothing is found in the cases from this court cited by plaintiff, which conflicts with the decisions hereinbefore cited or with the statement just quoted, or in any way impinges upon them. It would lengthen this brief unduly to analyze and discuss, case by case, the facts and holdings in the several decisions cited by the plaintiff. We think that the result may be summed up accurately thus:

In determining whether or not jurisdiction has been acquired *in the first instance*, the Federal Courts are not bound by the Conformity Act. But in considering the defendant's pleading and determining whether the mode of pleading constitutes a waiver of the right to set up lack of jurisdiction, the Federal Courts will look to the State statutes; and if the method of pleading does not constitute a waiver under the State statute, it will not constitute a waiver in the Federal Court. Of course no State statute can *confer* jurisdiction in the first instance on the Federal Court; but the practice statutes of the States will be followed "so far as may be" in determining

a question of waiver. The Conformity Act is not absolute in its terms and the State statutes are not peremptorily binding on the Federal Court — not "conclusive" — but they will be followed unless such following will manifestly do violence to a proper administration of justice. Plainly in determining whether or not there has been a waiver, no violence is done to the administration of justice, by following a State practice statute that authorizes the filing at the same time of pleas to the jurisdiction and pleas in abatement. The contrasting thoughts and distinction that we have attempted to express, appear clearly in *Sou. Pac. vs. Denton, supra*... They appear not only from the facts and the discussion by the Court but also are thrown into bold relief by immediate juxtaposition in the opinion at page 209 of 146 U. S.

(2) That there is no conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case, and the decision of the Circuit Court of Appeals for the Fourth Circuit in *Mankin vs. Bartley*, is thought to be demonstrable by examining the two cases.

In the instant case there has never been a general appearance by the defendant, unless such has been effected by the removal from the State to the Federal Court, (already hereinbefore discussed in an earlier division of this brief); or by the manner of pleading adopted pursuant to the Mississippi statute, now under discussion. What was held by both the courts below, was that no general appearance had been so effected; and that consequently there had been no waiver of the want of jurisdiction.

In *Mankin vs. Bartley*, there was a general, unqualified apearance. This is what happened: One Speed Mankin, (apparently a racing driver) at a Fair ran his automobile into and injured two persons on the race track. One of them was Bartley. Bartley sued Mankin.

Process was issued on March 26th, returnable to the third Monday in April, which was the 21st day of April. This process was served on the defendant on April 10th. On April 15th the defendant, by his counsel, *entered a general appearance.* It was in the form of a paper writing addressed by the counsel to the clerk of the court and was in the following language:

> "In the cases of James Bartley vs. Speed Mankin and G. C. Saunders vs. Speed Mankin, actions of trespass on the case, *please enter our appearances for the defendant* in each of these cases at first rules and give rule for defendant to plead." (Emphasis ours.)

Thereafter, on May 6th, defendant filed two pleas; one, a plea asserting defendant's personal exemption from suit on the ground that he was a citizen of West Virginia (the action was brought in Virginia); and the other, a plea of *lis pendens* of another action between the same parties upon the same cause of action, in the United States District Court for the Southern District of West Virginia.

The plaintiff made the point that the plea to the jurisdiction came too late because the defendant had already appeared and submitted his person to the jurisdiction of the court. There was a Virginia statute which authorized filing at the same time pleas in bar and pleas in abatement. It was under this statute that defendant had assumed to file his pleas. By some process of reasoning that does not appear from the opinion, the defendant sought to make the statute relate back so as not only to avoid any harm from pleading the two pleas together, but also to qualify what was a prior unqualified general appearance. Naturally and properly this effort was held futile. The holding is accurately stated in the first head note.

Not only does what we have stated appear unescapably from the statement of the case by the Court at the opening of the opinion (just hereinbefore summarized), but it further appears from the language of the opinion itself at page 468 of 266 Fed.:

> "It follows that, *by reason of the unrestricted appearance of the defendant at the 2nd April rules*, the plea setting up exemption from suit in this district filed at 1st May rules, was unavailing. The exemption, if it existed, had been irrevocably waived *by the antecedent appearance*."

It still further appears by reference to a case in this court, referred to and followed by the Circuit Court of Appeals—*Interior Construction Co. vs. Gibney*, 160 U. S. 217. The holding of this Court in that case, as appears from the second head note, is that one who enters a general appearance in an action, thereby waives the right to raise any question of the jurisdiction of his person. This is such familiar and fundamental law that there can be no debate about it. The only question for debate in the instant case, as hereinbefore noted, is whether or not there has been effected a general appearance.

It is respectfully submitted that none of petitioner's grounds are well taken, and that its petition should be denied.

PALMER PILLANS
JAS. A. LEATHERS
Attorneys for Respondent

Bigham, Englar & Jones,
Pillans, Cowley & Gresham,
Leathers & Sykes,
of Counsel.

I, the undersigned Palmer Pillans, one of the attorneys of record for respondent, hereby certify that, on this fifth day of October, 1928, I have mailed, postage prepaid, three copies of this brief to Messrs. Green, Green and Potter, Attorneys of record for petitioner.

Palmer Pillans

[illegible]

(24)

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 48.

ROBERT S. COMPANY, et al.,

Petitioners,

—against—

SKANDINAVIA INSURANCE COMPANY,

Respondent.

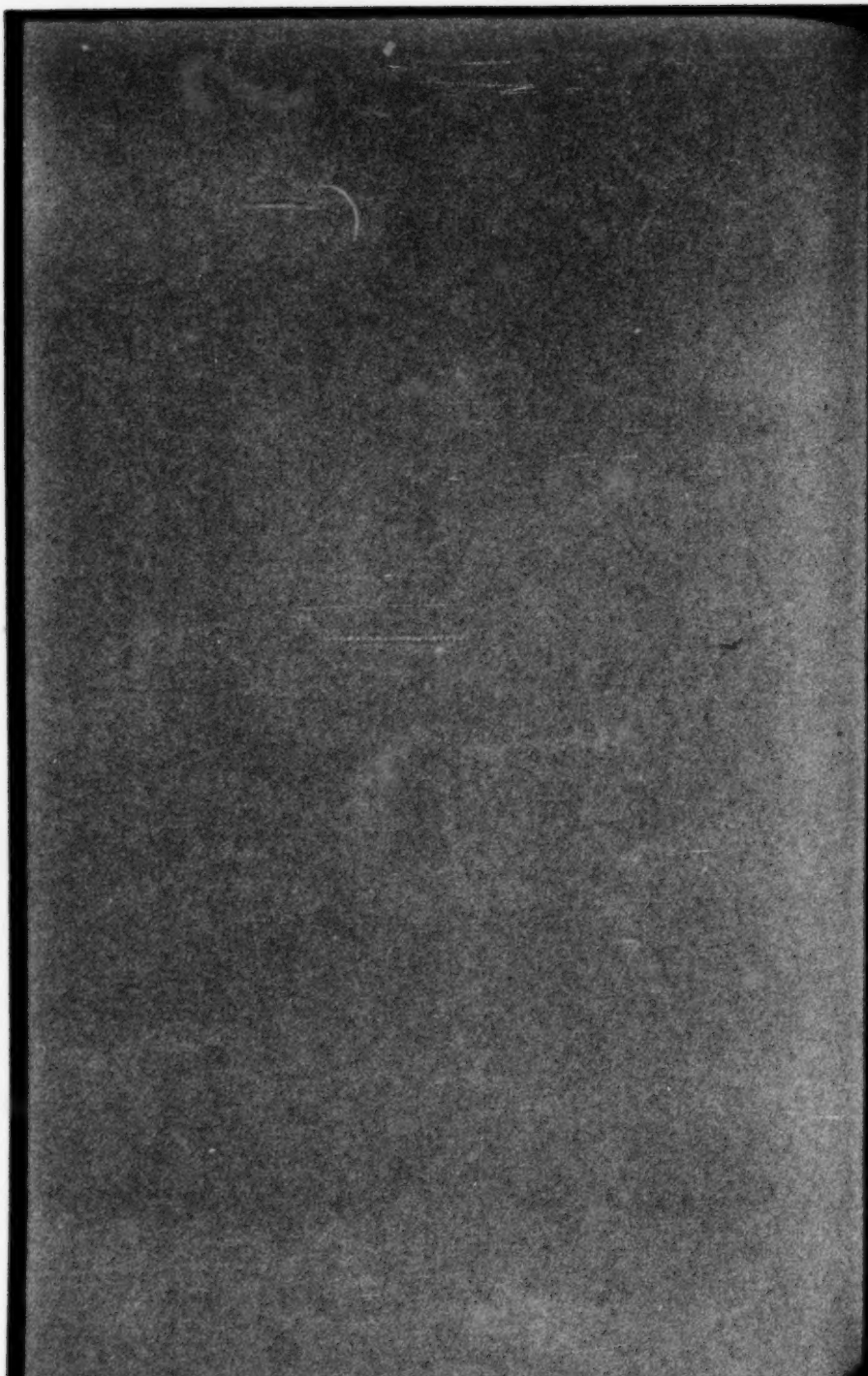
BRIEF FOR THE RESPONDENT.

OSCAR R. HOUSTON,

Counsel.

Durand, Ronalds & Jones,
Pollard, Cuyler & Gammack,
Lawrence & Byrne,

Attorneys for Respondent.



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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 450.

MORRIS & COMPANY, *et al.*,

Petitioners,

—against—

SKANDINAVIA INSURANCE COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT.

The petitioner has filed no brief except that submitted with the petition for a writ of certiorari and, therefore, this brief is drawn to meet the case as stated in the petition and accompanying brief. For convenience and in order to follow the same nomenclature as the petitioner, the parties are referred to as they appeared in the trial Court, where the petitioner was plaintiff and the respondent was defendant.

The opinion below is reported in 27 Fed. (2d) 329.

POINT I.

The defendant is not subject to suit in Mississippi because it neither did business in Mississippi nor consented to be sued therein by a non-resident in a cause of action not arising within that State.

It is common ground that

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of

consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."

Philadelphia & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264, 265.

(a) The defendant never did business within the State of Mississippi. This is a question of fact, and both of the lower Courts have concurred in so finding. The District Court said (Record, p. 184):

"Under the testimony, I do not think that the defendant has been doing business in Mississippi, consequently, the general Mississippi statute with reference to service on agents in transitory (actions) does not apply."

The Circuit Court of Appeals said (Record, p. 201):

"The record shows conclusively the following state of facts. Appellee does only a re-insurance business in the United States and all of this is transacted in New York City, the transactions being between appellee's agent and the original insurer. Appellee has re-insured risks on property situate in Mississippi and in compliance with the laws of Mississippi has appointed the Insurance Commissioner of Mississippi its agent for the purpose of service and has also appointed Wilkerson Inc. its nominal agent but that company has never had any transaction of re-insurance or otherwise for appellee, all business being negotiated and transacted in New York. Also in compliance with the Mississippi law appellee has filed annual statements of its re-insurance of risks on Mississippi property and paid an annual tax based thereon.

> We think it is clear appellee was not doing business in Mississippi so as to be subject to suit in that state on a cause of action arising elsewhere. *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8; *Simon* v. *Southern Ry.*, 236 U. S. 115."

The findings of the lower Courts are clearly correct. The testimony is undisputed that all the contracts of reinsurance entered into by the defendant were made in New York (Record, p. 121) and were between the defendant and companies whose home offices were outside of the State of Mississippi (Record, p. 120).

The effect of a contract of reinsurance is to create an obligation between the reinsured and the reinsurer, and this obligation, being undertaken in New York, obviously does not constitute doing business in Mississippi. The contract of reinsurance does not create any privity between the reinsurer and the owner of the property originally insured.

33 Corpus Juris, 57, Sec. 735.

> "The ordinary contract of reinsurance operates solely between reinsured and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policy-holders; and accordingly, they have no right of action against the reinsurer on the contract of reinsurance, nor any right of action against the reinsurer to reform the policy."

To similar effect is the decision of this Court in *Allemannia Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S.

326. The fact that the owner of the property may have been a resident of Mississippi is, therefore, immaterial, because the defendant made no contract with him.

Nor is it material that the defendant was entitled to write insurance in the State of Mississippi and may even have intended at some time to do business in Mississippi. The test is not whether the defendant "wished to keep open the possibility of doing business" in Mississippi, but whether, at the time process was served, it was, in fact, doing business in Mississippi.

Mitchell Furniture Co. v. *Selden Breck Co.*, 257 U. S. 213, at page 215.

The plaintiff repeatedly states in its brief that the defendant had made a deposit in the State of Mississippi as security for policy holders in the United States (Plaintiff's Petition and Brief, pp. 4, 9, 10, 20, 26). This is an error. The only deposit made by the defendant was the sum of $400,000, deposited with the New York Insurance Department (Record, p. 135). No deposit was made or required by the law of Mississippi to be made within that State.

The defendant paid no taxes in Mississippi; the taxes with respect to policies affecting property in Mississippi were paid by the direct writing companies (Record, p. 165).

There is nothing to the contrary in *State ex rel. European Accident Insurance Co.* v. *Tomlinson*, 129 N. E. 684. This was a mandamus proceeding by a foreign casualty company to compel the Superintendent of Insurance to license it to issue policies in Ohio. The Superintendent refused on the ground that the Ohio statute

required, as a condition of admission, an agreement that the admitted company would not reinsure certain classes of risks, either within or without the State. The case falls within the general rule that a state may attach such conditions as it pleases to the admission of a foreign company to do business within the State—at least where the company is not engaged in interstate commerce.

(b) Plaintiff cites no case to the effect that the state of facts found by the lower Court constitutes doing business, but apparently relies on the theory that the powers of attorney by which the defendant appointed the Insurance Commissioner of the State of Mississippi, its attorney upon whom process might be served and also appointed R. C. Wilkerson, its agent for the same purpose, constituted a consent to be served in this case even though the suit is by a non-resident of Mississippi and the cause of action arose outside the State. The rule on the point is stated by this Court as follows in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213, at pages 215, 216:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93. But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case

> the implication is limited to business transacted within the State. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 131, 132. *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, 22, 23. Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. *Chipman, Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373. The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this State'. Gen. Code, Sec. 181. As we know of no decision to the contrary by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad."

To the same effect is the decision in *Missouri Pacific R. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, at pages 535, 536.

See:

> *Maichok* v. *Bertha Consumers Co.*, 25 Fed. (2nd) 257,

where service was sustained solely because defendant was, in fact, doing business in Ohio.

The presumption, therefore, is that the designation of the agent is not intended to constitute a consent to a suit of the kind here involved, and the question is whether there is anything in the form of the designation or in the statutes and decisions of Mississippi to overthrow this presumption. The text of the designation of the Insur-

ance Commissioner appears at page 140 of the record and the text of the designation of R. C. Wilkerson appears at page 142 of the Record. They are both ordinary designations of an agent for the service of process and neither specifically refers to actions by a non-resident arising outside of the State of Mississippi. It may be noted that in the designation of the Insurance Commissioner, there is a provision:

> "this authority shall continue in force and irrevocable so long as any liability of the said Company remains outstanding in the said State of Mississippi, whether incurred before or since the making and execution of this instrument" (Record, p. 141).

If any inferences can be drawn from the form of the designation, this passage would suggest that the designation only applied to actions arising on liabilities outstanding in the State of Mississippi.

The language of the designations is no broader than the language in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213. In that case the defendant had filed in Ohio a power of attorney providing:

> "We hereby appoint Simeon Nash of • • • as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the state, and designate his office at • • • as the principal office of the company in the State of Ohio." (Transcript of Record in this Court, No. 27685, p. 56.)

The issue, therefore, comes to this: whether, either by decisions or statute, the State of Mississippi has provided that the mere designation of an agent by a

foreign corporation constitutes a consent to be sued by a non-resident in a cause of action arising outside of the State and thus brings the case within the ruling of *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93. It is submitted that none of the cases or statutes cited by the plaintiff go this far. The cases cited by the plaintiff (Brief, pp. 21, 23) are the following:

> *N. O. J. & G. N. R. R. Co.* v. *Wallace*, 50 Miss. 244.

This was an action for personal injuries suffered in a wreck in Louisiana. The defendant appeared voluntarily, made no claim that the Court lacked jurisdiction of its person, but objected on the ground that the Court had no jurisdiction of the subject matter of the action because it occurred outside the State. The Court pointed out the distinction, saying, page 248:

> "* * * as there is no objection to the service of process by which the plaintiffs in error are brought into Court * * *."

And, page 249:

> "We need not stop to inquire whether an appearance could be compelled, for here, as far as we know, it was voluntary."

> *L. & N. R. R. Co.* v. *Pool*, 72 Miss. 487.

This was an action against a defendant that operated a railroad through Mississippi. No objection to the jurisdiction was raised. The point at issue was the applicability of the statute of limitations of Alabama, where

the cause of action arose, which, it was contended, was made applicable by Mississippi Code, Sec. 2754.

Northern R. R. Co. v. *Fortenberry*, 107 Miss. 79.

This was a suit against a *Mississippi* corporation and the question involved was the applicability of the statute of limitations of Louisiana, where the cause of action arose.

Pullman Co. v. *Lawrence*, 74 Miss. 782.

This was an action in tort by a citizen of Illinois against an Illinois corporation for an assault committed outside of Mississippi. Process was served on the Pullman car conductor in charge of a car operating in the State of Mississippi. The defendant did not deny that it was doing business within the State of Mississippi and made no objection to the validity of the service, nor was any question of the effect of designating a resident agent involved. The point raised by the defendant was that the Court should not take jurisdiction of the subject matter because the plaintiff was a non-resident and the action arose outside the State.

Vicksburg S. & P. R. Co. v. *Forcheimer*, 74 So. Rep. 418.

The defendant operated a railroad through Mississippi and concededly was doing business in Mississippi. No question of the effect of the designation of an agent was involved.

Fidelity and Casualty Co. v. *Cross*, 127 Miss. 31; 89 So. Rep. 780;

Great Southern Life Ins. Co. v. *Gomillion*, 110 So. Rep. 770.

These two cases involved certain code provisions of Mississippi requiring the clerk to mail copies of process to a foreign corporation in addition to the original service of process upon the Superintendent of Insurance or local agent. The facts are somewhat obscurely stated, but apparently both suits were brought by residents of Mississippi on policies of insurance issued in Mississippi. At least, no point was raised as to the effect of the designation of an agent in relation to a suit by a non-resident in a cause of action arising without the State.

> *Delta Insurance & Realty Co.* v. *Fourth Natl. Bank*, 111 So. Rep. 435.

In this case the defendant, a foreign corporation, did no business in Mississippi, but had employed an attorney in Mississippi to bring suit on some promissory notes. The case holds that service of process on such attorney in an independent suit was not sufficient.

> *Camden Fire Ins. Co.* v. *Delaney.* (This case is erroneously cited as being reported in 116 So. Rep. 743, and has not been found.)

The Mississippi statutes cited by the plaintiff (Brief, pp. 23-26) are Hemingway's Code, Sections 4088 and 4093. The first of these sections merely provides that foreign corporations may be sued in Mississippi as individual non-resident debtors may be sued. The second section provides that a foreign corporation

> "*found doing business in this state* shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not * * *."

The statutes and decisions, therefore, come to this: In Mississippi the courts have jurisdiction of transitory actions by non-residents against foreign corporations, if such foreign corporations are doing business within the State of Mississippi or if they voluntarily appear in the action. There is no statutory statement or decision or dictum in the State Courts of Mississippi construing the appointment of an agent for the service of process as extending to suits in respect of business transacted by a foreign corporation elsewhere.

The law of Mississippi appears, in fact, to be substantially identical with the law of Ohio, which was before this Court in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213. In that case it appeared that by the law of Ohio a foreign corporation could be sued in Ohio by a non-resident "no matter where the cause arose, if the subject matter be within the jurisdiction of the Court".

Handy v. *Insurance Co.*, 37 O. St. 366.

This case was called to the attention of this Court in the brief of the plaintiff-in-error (pp. 17, 18). There is nothing in the law of the State of Mississippi that goes further than the law of Ohio in the above case.

In this connection it should be noted that the cause of action in the present case arose May 23, 1919 (Petition for Certiorari, p. 5). The designation of a Mississippi agent by the defendant was made March 27, 1923, nearly four years after the cause of action accrued (Petition for Certiorari, p. 5; Record, pp. 141, 143). It is at least difficult to believe that the designation of an agent in Mississippi in 1923 should have any relation

to the issuance of a policy of insurance in Buenos Aires to a Louisiana corporation in 1918, covering a voyage to Havana.

The plaintiff seems to rely (Brief, p. 24) upon the underlined words in the following passage from the certificate of appointment of the Insurance Commissioner (Record, p. 141):

> "and this authority shall continue in force and irrevocable so long as any liability of the said company remains outstanding in the said State of Mississippi, whether incurred before or since the making and execution of this instrument."

If the underscored words have any materiality, they clearly apply only to liabilities in the State of Mississippi and not to the present suit.

POINT II.

The objection to the jurisdiction of the person of the defendant was not waived either by (A) removal or by (B) the plea filed.

(A) It is submitted that it is too well settled to require extended argument that the removal from a State Court to a Federal Court does not constitute a general appearance or waive the defendant's right to attack the jurisdiction of the person of the defendant,

> *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, at pp. 268-9;
>
> *Cain* v. *Commercial Publishing Agency*, 232 U. S. 124 (a case from Mississippi),

even though no special reservation of such rights is made in the petition (*Wabash Ry. Co.* v. *Brow*, 164 U. S. 271; reaffirmed in the *Cain* case at p. 131).

The cases relied upon by the plaintiff (Brief, pp. 31-39) all relate to the right of a non-resident plaintiff to remand a removed case on the theory that the action could not have been originally brought in that particular district because neither plaintiff nor defendant was a resident of that district. This Court has held that the action of a defendant in removing an action brought by a citizen of the United States not residing in the district to which the case is removed, constitutes a waiver of the *venue* provision of the Act.

> *Lee* v. *C. & O. Railway*, 260 U. S. 653;
> *Seaboard Co.* v. *Chicago, etc., Ry. Co.*, 270 U. S. 363.

This is an entirely different question from that involved in the present controversy and certainly there is nothing in any of the cases cited to indicate an intention to overrule the *Cain* case.

(B) Plaintiff claims that the defendant entered a general appearance because in one plea the defendant

> "appears specially for the purpose of filing the pleas and motions hereinafter set out and for no other purpose,"

and pleaded

> I. "that the court is without jurisdiction of the person" (Record, p. 37).

and that

> II. "this defendant still appearing specially

> and solely for the purpose of asserting its rights as in these pleas and motions set out, says that if this Honorable Court should hold that jurisdiction of defendant's person has been obtained, then this defendant, not waiving its insistence but respectfully insisting, reiterating and reasserting that this Honorable Court is without jurisdiction of defendant's person; says that it ought not to be held in this action * * * because, it says, the said plaintiff heretofore * * * impleaded the said defendant in a personal action in Admiralty for the same cause * * *" (Record, p. 38).

In support of this argument, the plaintiff relies primarily upon *Mankin* v. *Bartley*, 266 Fed. 466, claiming that the present case creates a conflict between the Fifth and Fourth Circuits on the point (Petition for Certiorari, p. 5). The *Mankin* case was decided on the ground that prior to filing the pleas to the jurisdiction and in abatement, the defendant had entered a general appearance. The process in the case was returnable on the 2nd rules day of April, 1919. On that day counsel for the defendant wrote the Clerk as follows:

> "In the cases of *James Bradley* v. *Speed Mankin* and *G. C. Saunders* v. *Speed Mankin*, actions of trespass on the case, please enter our appearances for the defendant in each of these cases at first rules, and give rule for defendant to plead."

The plea to the jurisdiction was first filed on May 6th, the first May rules. The Circuit Court of Appeals quoted at length from the opinion of the District Court, whose conclusion was as follows (p. 468):

> "It follows that, by reason of the unrestricted

> appearance of the defendant at the 2nd April rules, the plea setting up exemption from suit in this district filed at 1st May rules was unavailing. The exemption, if it existed, had been irrevocably waived by the antecedent appearance. On this ground alone I am constrained to hold that the present motions must be overruled."

The Circuit Court of Appeals added:

> "We approve this construction of the law."

Furthermore, the objection to the jurisdiction in the case related, not to failure to serve process properly, but to the *venue* provision that suit could only be brought in the district of the residence of the plaintiff or defendant.

None of the other cases cited in the plaintiff's brief seem to us to have any bearing on the issue here involved.

It is believed that the plaintiff has confused two entirely separate matters. The question of Federal jurisdiction is a matter of Federal law not affected by the conformity act, but the form in which pleas to the jurisdiction may be made is a matter of practice within the conformity act. This Court pointed out the distinction in *Southern Pacific Company* v. *Denton*, 146 U. S. 202, at page 209, where the Court said:

> "Under this act (the conformity act), the Circuit Courts of the United States follow the practice of the courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together."

In the present case the defendant appeared specially and moved to quash the attempted service of process and to dismiss the cause of action for want of jurisdiction over the person of the defendant (Record, pp. 35, 36). On the same day it also appeared specially to file the plea to the jurisdiction and the plea in abatement quoted above (Record, pp. 37-40). The trial Court consolidated the motion and pleas (Record, p. 68) and thereafter took testimony as to the question of jurisdiction and ultimately dismissed for want of jurisdiction (Record, p. 187). The motion to quash is apparently conceded by the plaintiff to be proper (Plaintiff's Brief, at the bottom of p. 46). The pleas were in accordance with the State practice. Sec. 537 of Hemingway's Mississippi Code, 1927, provides as follows:

> "The defendant may plead at the same time as many matters as he may have to the jurisdiction of the Court, to the disability of the plaintiff, and in abatement of the writ or declaration."

Both the lower Courts have held that this practice was proper and saved the defendant's rights.

Respectfully submitted,

OSCAR R. HOUSTON,
Counsel.

BIGHAM, ENGLAR & JONES,
PILLANS, COWLEY & GEISHAM,
LEATHERS & SYKES,
Attorneys for Respondent.